Filed 7/30/02 Ferrell v. Farias CA2/4

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DANA K. FERRELL, Plaintiff and Appellant, v. ALLAN FARIAS, Defendant and Respondent.	B153626 (Super. Ct. No. BC224061)

APPEAL from a judgment of the Superior Court of Los Angeles County, David N. Eagleson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

McKenna, Long & Aldridge and Michael H. Fish for Plaintiff and Appellant.

Majors & Fox, Andrew M. Greene and Gary W. Majors for Defendant and Respondent.

Plaintiff Dana Ferrell appeals from the grant of a demurrer sustained without leave to amend in favor of defendant-respondent Allan Farias. The case arose out of a commercial contract and plaintiff alleges breach of fiduciary duty, conversion, fraud, and damages claims. We find that since Farias owed no fiduciary duty to plaintiff, there can be no breach of that duty. Plaintiff's claim of conversion fails because the terms of the contract, properly considered on a demurrer, contradict his theory. Plaintiff's fraud claim fails because it was barred by the statute of limitations.

BACKGROUND

Appellant-plaintiff Dana Ferrell entered into a partnership agreement ("Agreement") with respondent Cuyamaca Bank through its president, Allan Farias, on October 31, 1991. Farias was also a member of the Bank's Board of Directors. The purpose of the partnership was to develop a 29-unit condominium Project named "Harbor Point II." Appellant was to have a 49 percent interest in the partnership and the Bank was to be Managing General Partner, with a 51 percent interest.

The partnership's sole asset was undeveloped land in Oceanside, California which the Bank had acquired from a third party. The partnership's sole purpose, stated in the Agreement was: "purchasing [of] the Real Property, obtaining construction financing to finance the construction of [Harbor Point II], completing the construction of the Project and selling the Project." Under the terms of the Agreement, "The Managing General Partner, and no other Partner, shall have the exclusive right and authority to manage and control the Partnership, its business affairs and assets and to make all decisions in connection therewith." This included exclusive control to "hold, operate, manage, lease, sell or otherwise

Transfer, or take any other actions with respect to, the Property or any other assets of the Partnership."

While in existence, Harbor Point II assumed significant debt associated with the property. The Bank, as lender, periodically advanced loans to itself as the Managing General Partner of Harbor Point II to provide capital for partnership operations, eventually amounting to $350,000. These loans accrued interest, which the Bank requested be repaid by Ferrell, per the Agreement. Appellant alleged that, contrary to his original understanding, he discovered in May of 1997 that the Bank and Farias were trying to market the property as undeveloped land. He also discovered that no construction financing had ever been obtained. As a result, in October of 1997, the Bank entered into a contract to sell the property as undeveloped land and he lost $373,420.

The Agreement provided that any dispute arising thereunder would be resolved by filing of a complaint in the Los Angeles County Superior Court which would then be referenced to a referee pursuant to Code of Civil Procedure section 638.

Ferrell filed his original complaint on February 1, 2000, which alleged breach of contract and breach of fiduciary duty against the Bank and requested an accounting. Even though causes of action were specifically stated only against the Bank and Does 1 through 100, Farias and Harbor Point II were named as defendants. The matter was referred to a referee pursuant to the terms of the partnership agreement. Farias and the Bank each demurred generally on the grounds that Ferrell failed to state facts sufficient to constitute causes of action upon which relief could be granted. The demurrer was sustained with leave to amend.

Ferrell filed his First Amended Complaint ("FAC") on August 23, 2000. He alleged seven different causes of action: (1) breach of contract against

the Bank; (2) breach of fiduciary duty against the Bank; (3) breach of fiduciary duty against Farias; (4) conversion against the Bank; (5) conversion against Farias; (6) fraud against the Bank and Farias; and (7) an accounting against Cuyamaca. Farias again demurred to the Third, Fifth, and Sixth causes of action.

In the Third Cause of Action, Ferrell alleged that Farias breached his fiduciary duty to Ferrell by having "personally directed and/or participated in Cuyamaca's breaches of fiduciary duties. . . . [¶] 30. As a legal result of the foregoing, Farias . . . [is] personally liable for Cuyamaca Bank's breaches of fiduciary duty under *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 504 ['Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct'.] [¶] 31. Moreover, by personally participating with Cuyamaca in breaching fiduciary duties that Cuyamaca owed to Ferrell, Farias . . . [is] personally liable under *Teledyne Industries, Inc. v. Eon Corporation* (S.D.N.Y. 1975) 401 F.Supp 729, 733 [defendants (directors) 'participated with Eon in breaching a fiduciary duty allegedly owed by Eon to Teledyne.']"

The Fifth Cause of Action for conversion against Farias individually was based on a theory that the bank had waived interest on loans advanced to Harbor Point II but that Farias, on behalf of the bank, improperly demanded that Ferrell repay interest owed on the loans. In the Fourth Cause of Action for conversion against the Bank, realleged in the Fifth Cause of Action, Ferrell listed the amount of $270,383 in interest paid from proceeds of the sale of the property to the Bank. The Fifth Cause of Action also alleged: "Like any other person, Farias . . . individually owed a duty to Ferrell, independent of Cuyamaca Bank's own duty, to refrain from committing intentional torts against Ferrell, including that of Conversion."

The Sixth Cause of Action alleged fraud against the Bank and Farias individually. The claim was based upon an allegation that neither Farias nor the Bank ever intended to develop the property owned by Harbor Point II but instead intended to sell the property undeveloped and never disclosed this intent to Ferrell who invested money in reliance on his belief that the property would be developed.

Farias demurred to the FAC. The referee sustained the demurrer, this time without leave to amend, and granted motions to strike portions of the complaint. Subsequently, plaintiff voluntarily dismissed the action against Cuyamaca Bank, so on appeal only Farias is a party. Plaintiff timely appealed.

DISCUSSION

a. *Standard of Review*

A demurrer tests the legal sufficiency of the complaint. First, we review the complaint *de novo* to determine whether it contains facts sufficient to constitute a cause of action, i.e., whether the trial court erroneously sustained the demurrer as a matter of law. (See *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087.) In so reviewing, we accept as true all material facts properly pleaded, those matters that may be judicially noticed, and materials attached as exhibits to or incorporated by reference in the complaint, but not contentions, deductions, or conclusions of fact or law, in order to determine whether plaintiff has alleged a cognizable claim under any legal theory. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) "[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties. [Citations.]" (*Biles v. Richter* (1988) 206 Cal.App.3d 325, 329, citing *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 486, internal quotation marks omitted.)

We review an order denying leave to amend for abuse of discretion. We will reverse only if we determine there is a reasonable possibility the pleading can be cured by amendment. (See *G.L. Mezzetta, Inc. v. City of American Canyon*, *supra*, 78 Cal.App.4th at pp. 1091-1092.) "[N]either the trial court nor this court will rewrite a complaint. [Citation.]" (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at p. 44, citing *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1153.) Where, as here, the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding abuse of discretion. (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at p. 44, citing *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098.)

b. *Breach of Fiduciary Duty*

The issue here is whether Farias owed Ferrell any duty, either arising out of the partnership or by virtue of his position as President of the Bank. More generally, the question is whether a duty flows from an officer of a partner corporation to one of the other individual partners if the officer is acting solely on behalf of the corporation in its role as partner. The referee concluded in the negative: "No facts are plead to create a legal duty from Farias to Ferrell. . . . [¶] By merely participating in the conduct of the Bank that allegedly breached the Bank's fiduciary duty, Farias did not breach a fiduciary duty to Ferrell." We agree.

The general rule regarding liability of directors and officers for torts of the corporation is stated in *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595: "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done.

They may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation [citations]. They are not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a breach of duty owed to the third person. [Citation.] Liability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, *not pecuniary harm*, to third persons [citation]." (Italics added.)

Appellant argues that Farias, as President and a director of the Bank, is liable if he authorizes, directs, or actively participates in tortious conduct, even if solely as an agent, and even if he did not personally owe any fiduciary duty to the plaintiff outside his duties as an officer. Appellant relies on the case of *Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d 490 for this proposition. But that case dealt with a claim for negligence resulting in personal injuries, one of the exceptions recognized in the general rule immediately set out above. Citing *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, *supra*, 1 Cal.3d at page 595, the court in *Frances T.* reiterated that the general rule precludes liability from attaching to officers and directors "absent allegations that they entered into a contract with plaintiff on their own behalf or purported to bind themselves personally. [Citation.]" (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at p. 512, fn. 20.)

This is known as the "business judgment" rule. The rule recognizes that as business corporations are profit-making ventures; "the decisions of directors will involve risk evaluation, assumption or avoidance, and some of these decisions may eventually prove erroneous." (18B Am.Jur.2d (1985) Corporations, § 1703, at p. 555.) The Supreme Court explicitly acknowledged this rule in *Francis T.*: "Virtually any aspect of corporate conduct can be alleged to have been explicitly or implicitly ratified by the directors. But their authority to oversee broad areas of

corporate activity *does not, without more,* give rise to a duty of care with regard to third persons who might foreseeably be injured by the corporation's activities." (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at pp. 506-507, italics added.)

In *Village Green*, the "more" was that the directors were in the position of landlord with respect to plaintiff's condominium complex; they were made aware of a dangerous condition in the condominium complex; they were the only persons in a position to remedy a hazardous condition; but they took no action. As a result, plaintiff was raped on the premises. The director's unreasonable failure to remedy the dangerous condition was, in the eyes of the Supreme Court, sufficient to overcome the business judgment rule. These facts, however, are very different from the facts alleged here.

The loss alleged by Ferrell is purely pecuniary. The FAC alleges that at all times Farias acted as an officer or director on behalf of the Bank in its capacity as the General Managing Partner of Harbor Point II. As such, any duty he owed was to the bank, not Ferrell. There are no allegations in the FAC that Farias personally contracted with Ferrell or that any action Farias took personally benefited Farias. The only allegations against Farias, quoted above, are mere conclusions that he is personally liable under either "*Frances T. v. Village Green Owners Assn.* . . . [or] . . . *Teledyne Industries, Inc. v. Eon Corporation.* . . ." Thus, the referee did not err in concluding no facts were alleged in the FAC giving rise to a duty on behalf of Farias to Ferrell for breach of fiduciary duty.

c. *Conversion*

Plaintiff alleges that Farias, as officer and director of the Bank, engaged in tortious conduct on or about May 23, 1997, by "embark[ing] on a plan to, among other things, enable Cuyamaca Bank to convert Ferrell's money by

falsely telling Ferrell, in writing, that 'over $170,000 of interest is owed on [Harbor Point II's] loan[s]' . . . when in fact Cuyamaca Bank had waived interest." Plaintiff further alleges that "[a]s additional personal acts to effectuate the conversion of money to pay interest that in fact had been waived, on or about May 13, 1997, Farias personally told the Board of Directors of Cuyamaca Bank that a capital call would be made on Ferrell." (Underlining in original.)

In ruling on this cause of action, the referee sustained the demurrer because: "The allegations clearly show that whatever Farias did was on behalf of the Bank. There is no allegation that Farias pocketed the funds. To the contrary paragraph 45 clearly states that the funds were received by Cuyamaca Bank." Because it is alleged that Farias was acting solely on behalf of the Bank, the business judgment rule would seem to preclude liability from attaching. But, "[a]n innocent agent who, under direction of his principal and in reasonable reliance upon the principal's right to possession, converts another's property, is liable. [Citations.]" (2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 151, p. 146.)

A trial court ruling which is correct, but for the wrong reasons, will be affirmed on appeal. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) We therefore analyze the allegations of the Fifth Cause of Action.

The essence of Ferrell's claim for conversion turns on his allegation that the Bank had waived interest on the loans it made to the partnership and therefore improperly converted proceeds from sale of the unimproved real property to pay itself interest due on the loans, proceeds which were otherwise due to Ferrell. The documents attached to the FAC contradict the allegation of waiver.

Documents attached to the pleading may be considered "on the face of the complaint" for purposes of evaluating a demurrer. (See *Mead v. Sanwa Bank California*, *supra*, 61 Cal.App.4th at p. 567 ["For purposes of a demurrer, we

accept as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to it"]; accord. *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 7:9, p. 7-7; California Forms of Pleading and Practice, ch. 206, Demurrers, § 206.28[2][b], p. 206-47 (Matthew Bender 2002); see also *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400 ["When a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits . . . the contents of the instrument"].) Facts contained within attached documents are given precedence over facts expressly pleaded in the complaint. (See *Mead v. Sanwa Bank California*, *supra*, 61 Cal.App.4th at pp. 567-568 ["If the facts appearing in the attached exhibit contradict those expressly pleaded, those in the exhibit are given precedence."])

The FAC alleges that an entry of "0.00" under the subtitle "INTEREST" on one line of the "Commercial Loan History Card" dated May 16, 1997, demonstrates that the Bank waived interest on the loans made to Harbor Point II. Appellant's reliance on this one entry to justify his allegation of waiver is not warranted. Reference to the whole card demonstrates his error. The loan was originally made on November 27, 1991, and was due on December 31, 1996. In other words, repayment of the loan was overdue on May 16, 1997. The principal amount of the loan was $350,000. The line referenced by appellant is contained under the heading "PAYMENTS BILLED/NOT RECEIVED." It shows the principal amount due of $350,000 with late fees of $17,500 for a total of $367,500. The purpose of the line was apparently to show accrual of the late fee, not interest. The immediately preceding section contains historical information relating to interest. It is titled "INTEREST DATA" and reflects interest at the rate of 12 percent with total interest accrued to date of the statement, May 16, 1997, in the amount of $204,070.24.

Pursuant to the Agreement, Ferrell was required by section 9.2.1 to contribute additional capital "[t]o the extent the Partnership requires capital in excess of the initial capital, . . . in such amounts as are sufficient to enable the Partnership to complete the Project." Section 9.2.5 of the Agreement provides: "At all times, the Managing General Partner shall have the right, but not the obligation, to make loans to the Partnership to satisfy the Partnership's capital requirements. *If the Managing General Partner elects to make a loan to the Partnership, the loan shall bear interest at the prime rate of Cuyamaca Bank . . . plus three percent (3%).*" (Italics added.)

There is no allegation in the FAC that this portion of the Agreement was ever amended or abrogated. Thus, the Bank had a right to charge interest on loans made to the Harbor Point II and to collect against Ferrell for his portion owed. Appellant's reference to the "Commercial Loan History Card" does not justify his conclusion that the Bank waived interest on the loan to establish a foundation for his claim of conversion.

d. *Fraud*

Ferrell next alleges that Farias and the Bank made misrepresentations from September 1992 through August 1996 with respect to purpose of Harbor Point II: that it would be developed and sold as a completed development. Instead, at all times, Farias and Cuyamaca intended to sell the project as undeveloped.

Code of Civil Procedure section 338, subdivision (d) establishes a three-year statute of limitations upon "action[s] for relief on the ground of fraud." (Code Civ. Proc., § 338, subd. (d).) The statute qualifies this time period by adding that "[t]he cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud."

(*Id.*) This "discovery rule" "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

"[T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof -- when, simply put, he at least 'suspects . . . that someone has done something wrong' to him. . . . He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person *on inquiry*.'" (*Id.* at pp. 397-398, citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111, italics in original.)

"[O]nce the plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with the knowledge of facts which would have been discovered by such an investigation [citation]." (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131, citing *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440-442.) In other words, where a suspicion is triggered, a plaintiff must initiate an investigation into the facts; he cannot wait for facts to find him. (*Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at pp. 1110-1112.) Nor does the statute begin running anew each time a plaintiff discovers an allegedly new fraudulent statement made further in the past. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 484.)

Here, dates are of the essence. In paragraph 15 of the FAC, Ferrell alleges that "[o]n or about May 1997, and again on or about September 1997, Cuyamaca and DOES 26 through 30 breached the Agreement, . . . by demanding that Ferrell contribute an additional $257,115 -- *not for the purpose of 'complet[ing] the Project' but instead, in breach of the Agreement, in connection with the sale of the Real Property in an undeveloped state*." (Italics added.) The

referee found this date determinative and concluded that, "in May 1997 plaintiff was put on notice that Ferrell was expected to contribute an additional $257,115.00. . . . This is a judicial admission. The plaintiff's allegations that he did not find out until May or June 2000 that it was the Bank's intention to attempt to sell the property as undeveloped land merely validates that which he knew back in May 1997. Since this cause of action was not plead [*sic*] until August 2000 the statute of limitations applies." We agree.

When Ferrell was told in May 1997 that the Bank needed an additional $257,115 from him in aid of selling the property in an undeveloped state, this put him on inquiry notice for purposes of triggering the statute of limitations. Because Ferrell did not assert a cause of action for fraud until filing of the FAC on August 23, 2000, his fraud claims are barred.

e. *Motion To Strike*

Appellant contends that emotional distress and punitive damages were improperly stricken from the complaint. Because we find that no valid claims exist against Farias, no causes of action remain to which such damages may attach.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.